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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

JOHN M. HEGARTY, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF KATHERINE A. HEGARTY,

Petitioner,

vs.

SOMERSET COUNTY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION FOR RESPONDENT GARY WRIGHT

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30 pp

TABLE OF CONTENTS

Page

Statement of the Case 1

Reasons for Denying the Writ 13

I. This Court's Recent Decision in *Johnson v. Jones* Does Not Warrant the Granting of a Writ of Certiorari in this Case. 13

A. The District Court Did Not Base Its Denial of the Respondents' Motions for Summary Judgment on the Existence of a Material Factual Dispute. 14

II. The Court of Appeals Fully Considered and Correctly Decided the Issues. 20

A. The Summary Judgment Standard. 20

B. The Substantive Law of Qualified Immunity. .. 21

Conclusion 26

TABLE OF CITATIONS

Cases Cited:

Anderson v. Creighton, 483 U.S. 635 (1987) 14, 19, 22

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 20, 21

Gibson v. Officer, P.A., 44 F.3d 274 (5th Cir. 1995) 24

Contents

Page

Graham v. Connor, 490 U.S. 386 (1989) 21

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 22

Hegarty v. Somersel County, 848 F. Supp. 257 (D. Me. 1994) 15, 16, 17, 18, 19

Hegarty v. Somersel County, 53 F.3d 1367 (1st Cir. 1995) 15, 16, 17, 19, 22

Hunter v. Bryant, 502 U.S. 224 (1991) 22, 25

Johnson v. Jones, __ U.S. __, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) 13, 14, 19, 20, 26

Lellemand v. University of Rhode Island, 9 F.3d 214 (1st Cir. 1993) 21

Malley v. Briggs, 475 U.S. 335 (1986) 22

Minnesota v. Olson, 495 U.S. 91 (1990) 21

Ortega-Rosario v. Alvarado-Ortiz, 917 F.2d 71 (1st Cir. 1990) 21

Prokey v. Watkins, 942 F.2d 67 (1st Cir. 1991) 19

Statutes Cited:

Me. Rev. Stat. Ann. tit. 17-A § 210 5

Me. Rev. Stat. Ann. tit. 17-A § 211 5

Contents

	Page
42 U.S.C. § 1983	12
United States Constitution Cited:	
Fourth Amendment	21, 22
Rule Cited:	
Federal Rule of Civil Procedure 56(c)	20

STATEMENT OF THE CASE

On May 15, 1992, the Sheriff's Department for Somerset County, Maine received a telephone call from a camper reporting that "we got a lady shooting at us in the woods" at a campsite registered with the State. App. at 668.[1] The dispatcher was told in pertinent part:

> RD: Yes, uh, my names Bob Day, Alfred, Maine, I'm at Speedy's Truck Stop Jackman, Maine. We're camping, there's four of us, and we got a lady shooting at us in the woods.
>
> SO: A lady shooting at you in the woods?
>
> RD: Yes. We're at a campsite, it's all registered with the State, everything, we're there, a lady comes out of another camp and starts shooting at us. . . .
>
> SO: 10-4. I'm all set, I have a complaint in Jackman, shots fired at individuals.
>
> 04: Shots fired at what?
>
> SO: People. . . .
>
> SO: Okay, where are the other people?
>
> RD: They're right here beside me.
>
> SO: Okay. They're right there.

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1. All references in this Brief to the record are to the Joint Appendix ("App.") on file with the Court of Appeals for the First Circuit.

RD: We jumped in the truck, we headed out of there, she's shooting, started shooting at us, and, uh, she followed us all the way out the road and then she stopped and went back and we kept going. . . .

SO: Do you have any idea who the woman is?

RD: No, I don't. I have no idea if she's following us, or whatever, but she's got a loaded gun and . . .

SO: What does she have for a gun?

RD: I think it's a .22, but I'm not quite sure.

SO: Rifle? Pistol?

RD: It's a rifle. And she's drunk.

SO: Okay, I want you to stay right there.

RD: Yuh, I mean, all our stuff is there and she's already ransacked it once, we're pretty sure, ... And she's probably down there ransacking our stuff again.

SO: How do you know she's drunk?

RD: How, you know, I mean, you know, like we can tell.

SO: Why? I mean . . .

RD: I, I mean, she, believe me, (covered by radio traffic) completely. I mean, flipped right out.

SO: Okay.

RD: Not making any sense, or, I mean, unbelievable.

SO: Okay, I want you to stay right there. . . .

RD: What do we do if she comes here and starts shooting through the windows?

SO: I'd certainly take cover or leave.

App. at 668-671.

Deputy Rene Guay received an urgent radio call from his dispatcher, who advised him that a woman had fired approximately 30 bullets at four campers and that the campers had retreated to the Haynes Truck Stop (a/k/a "Speedy's Truck Stop"). App. at 241-42, 600. The dispatcher told Guay that the campers were afraid that the woman who shot at them would follow them to the truck stop. App. at 242, 600. Sergeant Wilfred Hines, Sergeant William Crawford, Deputy Thomas Giroux, and Maine State Trooper Gary Wright also responded. App. at 192, 242, 294, 571, 575, 588, 600.

Deputy Giroux, the first officer to meet with the campers, was also briefed by the dispatcher. App. at 75-76, 77, 611, 613.[2] When the campers described to Giroux the location where the

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2. All salient facts told to the dispatcher were also told by the campers to one or more of the officers at the truck stop. App. at 76-79, 83, 95, 198-201, 204-05, 219, 242, 296, 298, 571-75, 577, 600-02, 611-15, 669-70.

shooting had occurred and the woman who had done the shooting, Giroux knew that the woman had to be Katherine Hegarty. App. at 76, 245, 612. Giroux had hunted and fished in the area for 40 years and had known Hegarty for approximately 14 years. App. at 78, 612. Giroux described the campers as being "nervous wreck[s]" at the truck stop. App. at 76, 612. When Deputy Guay arrived at the truck stop, he noted that the campers were visibly frightened. App. at 243. When Guay heard the campers describe the woman who had shot at them, the location of her cabin, and her vehicle, he had "no doubt" that the woman was Katherine Hegarty. App. at 245, 572.

The campers told the officers that they had arrived at the campsite near Sandy Stream late in the afternoon on May 15, 1992. App. at 198, 571. The campsite was located on paper company property a "stone's throw" from the Hegarty cabin. App. at 78, 572, 613.[3] The campers reported to the officers that when the last two campers returned from fishing, Hegarty repeatedly asked them what they were doing. App. at 198-99, 571, 600-01. The campers told Hegarty they would leave first thing in the morning, but Hegarty continued to yell and scream at them, and she told them that they could leave "only if I let you leave." App. at 79, 199, 243, 571-72, 601, 614.

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3. In his Petition the Petitioner boldly asserts, without record citations, that the campers "dismantled her [Hegarty's] gate, trespassed on her property . . ." Petition at 4. The Petitioner also asserts that the campers "had illegally set up their camp and started a fire on her land." Petition at 5. There is absolutely no evidence that the campers *ever* trespassed on Hegarty's property. *See* entire record. Although the campers stated the campsite they were occupying was registered with the State, App. 668, and Jack Hegarty states that it was not so registered, App. 885, this difference is truly immaterial. Whether the campsite was registered or not, Katherine Hegarty had no right to shoot the campers. Most notable is the conspicuous absence of any assertion, even in Mr. Hegarty's affidavit, that the area in question was the Hegartys' property. App. 885.

The campers reported that Hegarty then started shooting at them. App. at 199, 572-73, 601. Hegarty shot five or six rounds at them, re-entered the cabin, turned the lights on, reloaded, turned the lights off, returned outside and shot five or six more rounds at them. App. at 78, 199, 572-73, 601. She reportedly repeated this sequence five or six times. App. at 78, 572.[4] The campers attempted to hide. App. at 199, 572, 601. The campers reported to the officers that they eventually figured out and timed Hegarty's reloading pattern, jumped in their truck and escaped. App. 78, 200, 613-14. There was only one exit from their campsite, and as the campers passed by the Hegarty cabin in their truck, Hegarty came out of the cabin, stood on the front porch and pointed a rifle at them. App. at 78-79, 200, 573, 601, 613-14. The campers did not know whether Hegarty shot at them as they drove by because they were shaken and travelling so fast. App. at 79, 200, 573, 601, 614. Hegarty then entered her vehicle and chased them at high speeds. App. at 200, 573, 613-14.

The campers expressed to the officers their belief that Hegarty might have been drinking. App. at 200, 573. The campers expressed concern that Hegarty would pursue them to

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4. The Petitioner also argues to this Court that: "They [the officers] further concluded that she [Hegarty] had not intended to hit the campers because she had a reputation as an expert shot and could have hit them if she really wanted to." Petition at 5. The Petitioner simply ignores two points in making this assertion. First, for the crimes for which Hegarty could be arrested, she need not have intended to hit the campers. *See, e.g.*, Me. Rev. Stat. Ann. tit. 17-A, § 210 ("a person is guilty of terrorizing if he communicates to another person a threat to commit . . . a crime of violence dangerous to human life . . . and the natural or probable consequence of such a threat, whether or not such consequence in fact occurs, is: A. To place the person to whom the threat is communicated or the person threatened in reasonable fear that the crime will be committed . . ."); § 211 ("A person is guilty of reckless conduct if he recklessly creates a substantial risk of serious bodily injury to another person."). Second, the Petitioner ignores the fact that Hegarty was reportedly drunk when firing the shots. App. 200, 573, 670.

the truck stop; they also expressed concern for other campers who were in the area. App. at 83, 195, 245, 298, 571, 613, 671. The campers told the officers that there were other campers in the area; they did not know if anyone else was near the Hegarty cabin on the opposite side of Sandy Stream. App. at 83, 195, 200-01, 204-05, 574. Guay knew of at least one campsite beyond Sandy Stream, close to where the four campers had been camping. App. at 602. Giroux knew of campsites within 1/8 mile of the Hegarty camp. App. at 83. The officers observed a number of occupied campsites on their way to the Hegarty cabin. App. at 88, 204, 577, 616. Giroux knew that the rest of the woods were usually "full of people" if those campsites were occupied. App. at 615.

Hines, the ranking officer, decided Hegarty would be arrested for shooting at the campers. App. at 298, 574, 603. The officers formulated a plan to locate Hegarty, investigate the campers' complaint, contain Hegarty, negotiate as necessary, and ultimately to arrest her. App. at 193.[5] Under the plan as formulated, Giroux was to attempt first to communicate with Hegarty as they knew one another well. App. at 98, 140. Once in custody, Hegarty was to be referred for a psychological evaluation. App. at 193. The situation was to be reassessed as they went along. App. at 195.

Hines, Guay, Giroux and Wright were all familiar with Hegarty's history of questioned mental instability and aggressiveness. App. at 197, 304-06, 575-76, 601-02, 612.[6]

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5. Hines had been trained at the Maine Criminal Justice Academy not to tell a subject that (s)he was under arrest if doing so placed the life of an officer, or some other person, in danger. App. at 202, 214, 219.

6. The Petitioner asserts that "[a] highly controverted issue in this case was whether Mrs. Hegarty was mentally imbalanced or irrational that day and whether she had a history of mental problems." Petition at 6. The relevant (Cont'd)

Wright had previously arrested Hegarty twice in one night during November, 1991 for operating under the influence of alcohol ("OUI") in Jackman, Maine. App. at 197, 303-04. After being released from the first arrest, Hegarty *drove* to Wright's home, screamed, laughed and made a commotion. She then drove off and Wright arrested her again for OUI. App. at 304-05, 602. Guay had assisted Wright on this night, and Guay determined, based on his own personal observation, that Hegarty was "irrational." App. at 250.

Wright had also been called to the Hegarty residence in the fall of 1991 due to Hegarty's mental instability; he had been directed by his dispatcher to assist with a "psychotic breakdown." App. at 306. Upon his arrival, he saw the ambulance parked in the Hegarty driveway; two ambulance attendants exited the residence and told Wright they would be transporting Katherine Hegarty. App. at 306. Wright went into the residence and heard "things breaking, smashing, screaming, hollering, yelling, laughing." App. at 306. Giroux learned from the ambulance attendants that Katherine Hegarty was removed from her house under sedation. App. at 79-80, 306, 612. Wright told the other officers that he had dealt with Hegarty before, that she knew how to use a gun and that she could be violent and extremely aggressive. App. at 575. The Petitioner's own expert witness testified that the officers believed Katherine Hegarty had a

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(Cont'd)
inquiry is the officers' reasonable understanding of her condition, not Mrs. Hegarty's actual mental condition. *See* Argument, *infra* at 24. The focus must be on the information in the officers' possession at the time they responded to the campers' complaint. The Petitioner also asserts that "the evidence . . . showed Katherine's 'history of emotional instability' to be attributable to one isolated occurrence several years earlier. The officers' knowledge of this occurrence was based solely on hearsay and rumor." Petition at 6. Directly contrary to this assertion, the officers' collective knowledge of Hegarty's history of instability was based upon personal observation of at least two incidents within less than one year before the incident in question.

history of mental instability, and the officers were justified in so concluding. App. at 385.

The officers proceeded to the area of the Hegarty cabin. At that point, the officers did not know Hegarty's whereabouts or if other people were nearby. App. at 89, 130, 298-301, 307, 577-78. It was *urgent* to reach the Hegarty cabin because "[t]he campers just said some lady fired 30-some-odd shots at them and that there [were] other campers in the area and that she had followed them out," and the Hegarty cabin was the "first place to start looking" for her. App. at 195. The officers drove part of the way and walked the rest of the way to the Hegarty cabin to lessen the chance of a violent response by Hegarty. App. at 96, 578. After the officers left the cruisers, they had no means of communication with the dispatcher or others, due to the remoteness of the location. *See* App. at 139, 590. Although it was after dark, it was a clear night and the moon was full. App. at 203, 577.

When the officers reached the Hegarty cabin, they noted the area around the cabin itself was wide open, and there were no lights on. App. at 90, 205-06, 253, 302, 603-04. The officers crossed the clearing. App. at 207, 578-79, 591-93, 616. Once the officers were positioned around the cabin, Giroux repeatedly shouted words to the effect, "Kathy Hegarty, this is Tommy Giroux, I'd like to speak with you. Please open the door so that I can talk to you." App. at 208, 616. He shouted to Hegarty for what seemed like a "long time" without any response. App. at 92, 617.

Hines then knocked on the cabin door and identified himself by name and as a law enforcement officer. App. at 208-09, 579. He told Hegarty he wanted to speak with her and asked her to come to the door. App. at 208, 211, 579.

At about the same time, Crawford conducted a perimeter

search of the cabin. App. at 142, 591-92. When Crawford shined his flashlight into a window, Hegarty swung her rifle and pointed it "right in [his] face." App. at 144-45, 592-93.[7] Scared, he dropped to the ground and yelled that she had a gun. App. at 145-46, 209, 593. Thus, the first time the officers knew Hegarty's whereabouts was when she pointed the gun at Crawford. App. at 141-45. Crawford identified himself by name and as a law enforcement officer and said, "Kathy, we want to talk to you." App. at 145. Giroux continued calling to Hegarty, and the officers heard her walking in the cabin. App. at 145, 209-10.[8]

After hearing Crawford's warning, Hines feared that Hegarty might use the weapon against either the officers or herself. App. at 214, 579, 582. It was not safe for the officers to retreat from the cabin, because the area around it was wide open and it was a bright moonlit night. App. at 218-19, 258, 579-80. If they retreated, they would have been clear targets to anyone inside the cabin. App. at 219, 579-80. Even so, the cabin walls were very thin, and they could have been shot directly through the cabin walls. App. at 219, 580.

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7. The Petitioner asserts that "[l]ess than three minutes before she was killed, Katherine Hegarty was awakened by Sgt. Crawford illuminating her bedroom with a flashlight . . . Still in bed, she reached for a long rifle . . . ." Petition at 7. No evidence exists to support this inflammatory statement: there is no evidence that Hegarty was asleep at the time Crawford illuminated the room, and the time frame set forth by the Petitioner is similarly without record support. Contrary to the bold assertion in the Petition, no evidence exists that Hegarty was unarmed at the time Crawford shined his light into the room.

8. Once again, contrary to the Petition in this case, no evidence exists that Hegarty walked into the front room of the cabin unarmed. Petition at 7. Hegarty either walked into the front room armed, or she had additional gun(s) in the front room, but no material difference of facts exists in this regard.

Giroux continued to request that Hegarty talk to him. App. at 92, 617-18. Guay, who also knew Hegarty on a first-name basis, identified himself. App. at 604. Hegarty responded by making unusual sounds and laughing "like a witch." App. at 211, 256, 604-05. After a period of time, Hegarty said to Guay words to the effect, "I can see you" in a "half baby-half witch" voice. App. 93, 256-257, 605-06. Guay shined his flashlight in the cabin window, illuminating Hegarty's face and her immediate surroundings. App. at 256-58, 605-06. Hegarty was kneeling on a couch with her face pressed up against the front window of the cabin. App. at 211, 218, 256, 605. She "smiled" at Guay with an unusual ("weird") expression on her face. App. at 95, 606. Guay told Hegarty that the officers were investigating camp burglaries and that they thought she might have seen someone that night. App. at 93, 211, 256, 311, 581, 605, 618-19. Hegarty told Guay that she had not seen anybody. *Id.*[9]

The four deputies were in uniform that clearly identified them as law enforcement officers. App. at 214; *see also* 256-57, 605. Hegarty knew for a fact that at least Guay and Giroux were indeed law enforcement officers. App. at 92, 208, 211, 311.

The officers continued their attempts to communicate with Hegarty to no avail. App. at 211, 605-06. They repeatedly asked Hegarty to turn the lights on and to come to the door. App. at 211, 257, 606. They repeatedly told her that it was safer for her and the officers if she did that. App. at 606. Hegarty responded by

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9. The Petitioner's assertion that Hegarty acknowledged to the officers that men had been around but that she could not describe them is without record support. *See* Petition at 7. Moreover, earlier in the evening, Wright had in fact received a complaint concerning burglaries in the area. App. at 256, 605. Finally, for the Petitioner to suggest that Hegarty, who had just repeatedly fired her gun at other human beings, was mentally stable yet had no idea that the officers may have been investigating that complaint, seems disingenuous.

laughing "like a witch." App. at 210-11, 256, 580, 593, 606. During the course of the officers' presence at the Hegarty cabin, Hegarty sometimes acted irrationally, sometimes made statements, and sometimes laughed oddly. App. at 146, 210-11, 256-57.

When Hegarty was on the couch, Crawford and Guay observed the area around Hegarty and did not see a weapon. App. at 148, 257, 594, 606. Not seeing a weapon, Guay said to Hines words to the effect, "She doesn't have a gun, go." App. at 149, 312, 582, 594, 606, 619.[10] Believing there was a good opportunity safely to separate Hegarty from her weapons and arrest her, Hines pulled open the screen door and kicked the front door. App. at 194, 215, 582, 584-85. The door casing split and the lock broke, but a chain kept the door from fully opening. App. at 215, 582. Hines kicked the door again and it opened. App. at 216, 582.

As Hines was attempting to get into the cabin, Guay saw Hegarty in front of the couch with her rifle in her hands. App. at 259, 607. When Guay saw Hegarty with the rifle, he yelled, "She's got a gun. Don't go." App. at 583, 607, 619. By this time, the door was opening and Hines was part-way into the cabin. App. at 216, 583. Hegarty looked toward the door and the barrel of her gun was pointed at the floor. App. at 152, 164, 259, 607. Her left hand was on the rifle forebarrel, her right hand on the

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10. The Petitioner argues, without record citation, that ". . . no officer believed she [Hegarty] posed any immediate danger." Petition at 7. The record reveals that the officers were around a cabin in the middle of a clearing on a moonlit night. The walls of the cabin were paper-thin. The area surrounding the cabin was an all "kill zone." App. at 219. The officers were on foot, with no means of communication to their dispatcher or others. Hegarty had reportedly fired 30 or so rounds at other human beings earlier. She had a history of mental instability and was acting inconsistently. She was suspected to have been drinking. Hegarty had just pointed a gun directly at Crawford. To say Hegarty posed no immediate danger is to stretch the facts beyond recognition.

stock and trigger, and she began raising the rifle toward the doorway. App. at 259-60, 607. *See also* 216. Guay was able to keep the area where Hegarty was located lit. App. at 260, 606. Hines then saw Hegarty smiling and standing in a shooting stance with the rifle. App. at 216, 583. Hegarty raised the rifle toward Hines. App. at 216, 313, 583. Her finger was inside the trigger guard. *Id.*

Guay and Hines repeatedly ordered Hegarty to "put the gun down, put it down, put it down," or words to that effect. App. at 260, 583, 596, 607-08, 619. Instead, Hegarty *continued to raise* the rifle. App. at 216, 583. Hegarty further swung toward the door and kept "*shouldering*" her rifle. App. at 313. When Hegarty's rifle was raised and pointed so that it was aimed directly at the center of Hines's chest, and she did not comply with the officers' order to "put the gun down," Hines, Guay and Wright all discharged their firearms, seemingly simultaneously. App. at 152-53, 216, 583, 596, 607-08, 619. The shots were fatal.

An inspection of the campers' campsite showed that their equipment had been thrown into the stream. App. at 584. Some of it had bullet holes in it. App. at 584. Officials found personal property belonging to the four campers in Hegarty's cabin. App. at 584.

Katherine Hegarty's husband, John, filed this lawsuit in the United States District Court for the District of Maine in his individual capacity and as personal representative of the Estate of Katherine Hegarty. Mr. Hegarty asserted several legal theories, including a violation of his and his wife's civil rights pursuant to 42 U.S.C. § 1983. All Respondents moved for summary judgment on all counts; the District Court denied the motions of the police officers asserting qualified immunity. The officers appealed to the United States Court of Appeals for the First Circuit. The Court of Appeals vacated the order denying summary judgment and

directed the District Court to enter summary judgment in favor of the officers on the basis of qualified immunity. The Petitioner now seeks review by this Court.

REASONS FOR DENYING THE WRIT

I.

THIS COURT'S RECENT DECISION IN *JOHNSON V. JONES* DOES NOT WARRANT THE GRANTING OF A WRIT OF CERTIORARI IN THIS CASE.

Following the issuance by the Court of Appeals of its decision in this matter, the Petitioner filed a Petition for Rehearing on or about June 7, 1995. Before the Court of Appeals issued a ruling on the Petition, this Court rendered its opinion in *Johnson v. Jones*, __ U.S. __, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995), limiting the right to appeal from a denial of qualified immunity in certain cases. On or about June 21, 1995 the Petitioner filed a "Supplemental Petition for Rehearing," attaching a copy of the *Johnson* opinion and asking the Court of Appeals to throw out the case it had just decided. The Court of Appeals declined to do so. The Petitioner now argues that this Court should grant his Petition for a Writ of Certiorari and remand the case to the Court of Appeals with instructions to reconsider its decision in light of *Johnson*. Petition at 28-29.

Since the Petitioner attached a copy of *Johnson* to his Supplemental Petition for Rehearing, there is no reason to believe that the First Circuit has not already considered any potential ramifications of *Johnson* in connection with this case. Moreover, as is more fully discussed below, *Johnson* does not apply unless there is a finding of a genuine factual dispute. Throughout the appellate process the Petitioner has attempted, through gross distortion of the record, to create the appearance of a genuine

factual dispute where none exists. The Petitioner continues this practice in seeking a Writ of Certiorari in this Court. For the reasons described below, *Johnson* does not apply to this case and the Petition should be denied.

A. The District Court Did Not Base Its Denial of the Respondents' Motions for Summary Judgment on the Existence of a Material Factual Dispute.

In *Johnson*, __ U.S. at __, 132 L. Ed. 2d at 251, this Court held:

> [A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a "genuine" issue for trial.

The Petitioner makes a strenuous but disingenuous effort to create the appearance of a genuine factual issue in this case, but no genuine dispute exists and neither the District Court nor the Court of Appeals noted any such dispute. In fact, while the Petitioner accuses the Court of Appeals of misapplying the summary judgment standard by failing to view the record in the light most favorable to him (an argument the Respondent will address in Part II below), there is little difference between the facts recited by the District Court and those recited by the Court of Appeals on the crucial question of what information the police officers possessed at critical moments before and during their encounter with Katherine Hegarty. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (relevant question in qualified immunity determination is whether a reasonable officer could have believed the conduct lawful in light of clearly established law and information the officers possessed). For example,

regarding Katherine Hegarty's initial confrontation with the campers, the District Court opinion states:

> Sometime around 9:00 p.m., Hegarty confronted the campers asking who gave them the key for the gate. The campers believed Hegarty was either intoxicated or mentally unstable. Hegarty told the campers, among other things, "this is my house and you're invading my privacy." After another verbal exchange, the campers told Hegarty that they would leave in the morning. Hegarty responded, "[o]nly if you make it 'til the morning." Hegarty went into the cabin and retrieved a gun, and then, from her porch, fired a number of shots in the air in the vicinity of the campers.... One of the campers asked Hegarty if they could leave, and Hegarty responded that she would follow them to see how they got through the gate. During one of Hegarty's trips into her cabin, the campers got into their truck and drove away quickly. As the campers passed Hegarty's cabin, they saw her come out with a gun but they are unsure whether she fired any shots. The campers believed that Hegarty followed them part way down the dirt road.

Hegarty v. Somerset County, 848 F. Supp. 257, 261-62 (D. Me. 1994) (record citations omitted). Regarding the same confrontation, the Court of Appeals opinion says:

> At around 9:00 that evening, Katherine Hegarty became extremely agitated when she saw the campers returning to their campsite

> for the night, and began screaming that they had trespassed on her property. The campers assured her that the caretaker had given them permission to use the campsite and they would be leaving the next morning. To which Katherine responded: "Only if you make it until the morning." She then retrieved a rifle from inside the cabin and fired six rounds from the porch in the direction of the campers, who immediately took cover behind their trucks and boat. During the next hour or so, Katherine reloaded her rifle several times, firing approximately twenty-five additional rounds in the direction of the campers before eventually yielding to their pleas for permission to depart in safety. . . . [T]he campers drove their vehicles quickly past the cabin, where they saw Katherine on the porch, rifle in hand. Although no further shots were fired, Katherine followed the campers in her truck beyond the entrance gate, then turned back in the direction of her cabin.

Hegarty v. Somerset County, 53 F.3d 1367, 1370 (1st Cir. 1995). Both of these accounts convey the same information about the situation that prompted the campers' call to the police for help: a woman began yelling at them for no reason apparent to them, then began shooting at them, at once both ordering them to leave and making it impossible for them to do so safely. When they did finally find a break in the shooting and began to drive away, she jumped in her truck and followed them. None of these facts are disputed.

In addition to the above, both courts note that Katherine Hegarty was a registered Maine guide with a reputation for excellent marksmanship. 848 F. Supp. at 261; 53 F.3d at 1370.

Both courts describe the officers' familiarity with Katherine Hegarty's past unstable behavior:

> Several of the officers had concerns about Hegarty's mental and emotional condition. Giroux's concerns were based on an incident in which Hegarty had to be sedated. Wright had arrested Hegarty the previous year for operating under the influence and the two became involved in a dispute at that time. Wright told all of the other officers involved about the dispute.

848 F. Supp. at 262, n.4 (record citations omitted). The Court of Appeals said:

> [T]he officers knew she had some history of emotional instability (*i.e.*, a nervous "breakdown" in 1991, requiring sedation, physical restraints and a brief period of involuntary hospitalization), substance abuse (two arrests for operating a motor vehicle while under the influence of alcohol ("OUI") in 1991), and incidents of erratic, violent behavior directed at law enforcement personnel — kicking and throwing punches at State Trooper Gary Wright, asking irrational questions, and exhibiting extreme mood swings (alternately screaming and laughing) at the time of her first OUI arrest, and an assault/harassment against Trooper Wright at his residence shortly after the same arrest.

53 F.3d at 1370-71. While the Court of Appeals includes more detail in its account (all of which is based on undisputed facts in

the record, as described above in the Statement of the Case), both statements convey the same understanding of what information the officers possessed regarding Katherine Hegarty's emotional state.

The two courts' descriptions of the events that took place at the cabin — culminating in the death of Katherine Hegarty — are once again substantially similar. Both courts relate that the officers approached the cabin on foot, heard loud music playing on the radio but saw no lights on inside the cabin; that Deputy Giroux called out to Hegarty but there was no response; that the first time any of the officers saw anyone inside the cabin was when Katherine Hegarty pointed her rifle at Sergeant Crawford; that the officers did not tell Hegarty that she was under arrest or that they intended to arrest her; and that during the officers' conversation with her she laughed intermittently and "appeared to be intoxicated or mentally unstable." 848 F. Supp. at 262-63; 53 F.3d at 1371. Similarly, both courts note that the officers waited to enter the cabin until they thought Katherine Hegarty was unarmed; that Deputy Guay gave the signal to go in; that Sergeant Hines then kicked the door in; that Katherine Hegarty picked up her rifle and pointed it at Hines and Trooper Wright; and that the officers discharged their weapons after Hegarty ignored repeated requests to put her gun down. *Id.*

Importantly, the difference in outcome in the two courts lies not in the facts themselves but in the application of the law to the facts. The District Court concluded that on the basis of the stated facts "the officers could not reasonably have believed that their forcible intrusion into Hegarty's home was justified by exigent circumstances." 848 F. Supp. at 264. The Court of Appeals concluded on the same facts

> that a competent police officer — possessing the same information the defendant officers

> had on May 15, 1992 — reasonably could have believed both that there existed probable cause to arrest Katherine Hegarty and exigent circumstances justifying their immediate warrantless entry.

53 F.3d at 1379.

Unlike in *Johnson* — where the issue presented on summary judgment was an absolute factual dispute as to whether the plaintiff could prove that the defendants were present or participated in the use of excessive force during arrest and booking — the summary judgment issue in this case is whether the officers' conduct was objectively reasonable in light of the information they possessed. *Anderson*, 483 U.S. at 641. The question of objective reasonableness is one of law for the Court to decide. *Prokey v. Watkins*, 942 F.2d 67, 73 (1st Cir. 1991). It is only where there is a genuine dispute as to what the officers knew prior to the challenged conduct that a jury question arises. *Id.* The District Court *did not* rule in this case that there was a dispute as to what the officers knew.[11] Instead, the Court held that given what the officers knew, they should not have made the entry into the Hegarty cabin. The Court of Appeals disagreed, not referring to any factual differences, but citing substantial legal authority to support its conclusion that the officers' conduct was objectively reasonable under the circumstances. *Hegarty*, 53 F.3d at 1379.

This case does not entail the *Johnson* "we didn't do it" defense with its attendant factual dispute, and *Johnson* does not apply to this case. There is no reason for further review of the decision of the Court of Appeals. The Petitioner's elaborate attempt to re-construct this case as one presenting hotly disputed facts collapses in the face of a realistic review of the record.

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11. While the Court took note in a couple of instances of contested details, none of these related to the issue at hand. *See, e.g.*, 848 F. Supp. at 262.

II.

THE COURT OF APPEALS FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES.

Although the only relief the Petitioner requests in his Petition is that this Court remand the case to the Court of Appeals with directions to reconsider the case in light of *Johnson*, the Petitioner repeatedly refers to allegedly egregious errors committed by the Court of Appeals. Foremost among these is the supposed failure of the Court of Appeals to view the record in the light most favorable to the Petitioner. The opinion of the Court of Appeals amply demonstrates that the Court was aware of and applied the correct standard, both in reviewing the summary judgment record and in deciding the qualified immunity issue.

A. The Summary Judgment Standard.

Rule 56(c) of the Federal Rules of Civil Procedure requires the court to enter summary judgment in favor of a party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." As this Court noted in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986):

> By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.

With respect to the materiality component, the *Liberty Lobby* Court said:

> [T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.

Id. Although "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor . . . ," *id.* at 255, there is certainly no requirement that the Court permit *distortions* of the record in the Petitioner's favor. *Lellemand v. University of Rhode Island,* 9 F.3d 214 (1st Cir. 1993). "Unsupported allegations are insufficient to create a genuine dispute." *Ortega-Rosario v. Alvarado-Ortiz,* 917 F.2d 71, 73 (1st Cir. 1990).

B. The Substantive Law of Qualified Immunity.

In order to address the Petitioner's argument that this case presents genuine issues as to material facts precluding summary judgment (an argument which, as discussed above, neither the District Court nor the Court of Appeals endorsed), it is necessary to consider the applicable substantive law. In a case like this, where the Petitioner alleges a warrantless entry and excessive use of force by police officers,[12] the Fourth Amendment governs the analysis. *See Minnesota v. Olson,* 495 U.S. 91 (1990) (applying Fourth Amendment analysis to warrantless entry); *Graham v. Connor,* 490 U.S. 386, 395 (1989) (all claims that law enforcement officers have used excessive force are analyzed

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12. Initially the Petitioner argued that neither probable cause nor exigent circumstances existed to justify a warrantless arrest and that the officers used excessive force in entering the cabin. The Petitioner does not raise the probable cause issue in this Court, but limits the alleged constitutional violations to the warrantless entry and the alleged use of excessive force. Petition at 16-18.

under the Fourth Amendment and its "reasonableness" standard).

The qualified immunity analysis begins with the proposition that

> government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In a case involving an allegedly unreasonable search or seizure the inquiry focuses on "whether a reasonable officer could have believed [the conduct] to be lawful, in light of clearly established law and the information the . . . officers possessed." *Anderson v. Creighton,* 483 U.S. 635, 641 (1987). A law enforcement officer who reasonably but mistakenly concludes that probable cause and/or exigent circumstances exist is entitled to qualified immunity. *Id.* Otherwise stated, "The qualified immunity standard 'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.' " *Hunter v. Bryant,* 502 U.S. 224, 229 (1991) (*quoting Malley v. Briggs,* 475 U.S. 335, 343, 341 (1986)).

In reaching its decision that the officers acted reasonably, the Court of Appeals relied on undisputed facts regarding the information possessed by the officers at the relevant times. *Hegarty,* 53 F.3d at 1375-76. The Petitioner takes issue with the Court's reference to Katherine Hegarty's emotional instability. According to the Petitioner, he "specifically and seriously contested" Katherine Hegarty's history of emotional instability, violence, irrational behavior and unpredictability. However, on examination of the few record citations the Petitioner has provided, Petition at 20, it is evident that the Petitioner did *not*

generate any genuine issue on any relevant points. For example, the Petitioner seems to think there is an inconsistency between Deputy Giroux's statement that he knew that Katherine Hegarty had been involuntarily committed to a hospital for mental or emotional problems during the fall of 1991 (Somerset County Defendants' Statement of Undisputed Facts ¶ 4, App. at 544), and Giroux's testimony that he was told by others that Mrs. Hegarty had been taken by ambulance to a hospital during the fall of 1991. App. at 847. This supposed inconsistency is lost on the Respondent, and certainly does not rise to the level of a material dispute.

The Petitioner also attempts to create the illusion of a factual dispute by comparing the statement that Giroux knew that Katherine Hegarty had been arrested by Wright for OUI and had been extremely combative and assaultive when Wright arrested her (Somerset County Statement ¶ 4, App. at 545), with Giroux's testimony that he had been told that Wright had arrested Katherine Hegarty previously and that she had assaulted him in his kitchen. App. at 847. Again, this is not a genuine dispute. Similarly, contrary to the Petitioner's assertion, there is no discernible difference between the statement that the briefing Sergeant Crawford received before going in search of Katherine Hegarty raised questions in his mind about her mental stability (Somerset County Statement ¶ 9, App. at 547) and Crawford's testimony that he was "concerned" that Katherine Hegarty might be mentally unstable that evening. App. at 852. In none of these instances has the Petitioner explained how a difference in semantics or emphasis creates a genuine factual issue or negates the conclusion that the officers reasonably believed Katherine Hegarty was mentally unstable on the night in question.[13]

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13. On the mental instability question, it is also significant that the Petitioner's own expert, Mr. MacLaran, testified that the officers believed that Katherine Hegarty had a history of mental instability and that they were justified in so concluding. App. at 385.

The Petitioner states that the Court of Appeals "grossly distorted" the record in describing the campers' reaction to having been screamed at, shot at, and chased through the woods by Katherine Hegarty. Petition at 20. To the contrary, the Court's reference to Katherine Hegarty as "flipped out" and "intoxicated" as well as the statement that she "might pursue them to the truck stop and shoot at them" comes directly from the transcript of the call by camper Robert Day to the Somerset County Sheriff's Department made as soon as the campers came out of the woods. *See* Statement of the Case, *supra* at 1-2. This was the first information provided to the officers as they were called to the scene.

The Petitioner continually harps on alleged evidence in the record indicating that Katherine Hegarty was not irrational or violent. This argument ignores the fact that the relevant inquiry is not whether Mrs. Hegarty was *actually* irrational or violent, but whether the officers could reasonably have so believed based on the information they possessed. *E.g., Gibson v. Officer, P.A.*, 44 F.3d 274, 277-78 (5th Cir. 1995) (proper focus is not upon factual dispute as to whether suspect was intoxicated, but whether objective facts might lead a reasonable officer so to conclude). As previously discussed, there is no dispute as to the information the officers possessed in this regard.

The Petitioner states that the "final and critical issue presented by this case is what an objectively reasonable police officer would do once he had located Mrs. Hegarty and there was no immediate danger of harm to the other officers." Petition at 25. The Petitioner uses this incorrect statement of the legal standard as a lead-in to a discussion of his expert's criticisms of the conduct of the police officers. The issue is decidedly *not* whether an objectively reasonable police officer could have or might have behaved differently under the circumstances. Instead, the correct analysis is as follows:

> [T]he court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact.

Hunter v. Bryant, 502 U.S. 224, 228 (1991). The Court of Appeals carefully considered the opinions of the Petitioner's expert and rationally concluded that the opinions did not alter the objective legal reasonableness analysis. *Hegarty*, 53 F.3d at 1375-1378.

The Court of Appeals applied the correct standard both in considering the record for summary judgment purposes and in identifying the material facts in the context of the qualified immunity issue. Any distortion of the record in this matter has occurred, not at the hands of the three Judges sitting in Boston, but at the hands of the Petitioner.

CONCLUSION

Because the District Court's denial of the Respondents' motion for summary judgment *did not* determine that the record set forth a genuine issue for trial, and because in fact there is no genuine issue for trial on the qualified immunity defense, the decision in *Johnson v. Jones*, __U.S. __, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) does not apply. The decision of the Court of Appeals was correct in all respects and there is no justification for further review. Respondent Gary Wright therefore respectfully requests that the Court deny the Petitioner's Petition for a Writ of Certiorari.

Respectfully Submitted,

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